No. 14,566

IN THE

United States Court of Appeals

For the Ninth Circuit

ELMER W. BROWN,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, ALASKA AGGREGATE CORPORATION and MORRELL P. TOTTEN & COMPANY, INC.,
Appellees.

Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEES ALASKA AGGREGATE CORPORATION AND MORRELL P. TOTTEN & COMPANY, INC.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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FACTS.

Elmer W. Brown was employed by the Alaska Aggregate Corporation at the Colorado Coal Mine near Anchorage, Alaska, for the period from August 29, 1952 through November 24, 1952. He claimed that he injured his knee on September 15, 1952. He continued his work until November 24 when he returned to his home in Seattle, Washington. On December 16, 1952, he underwent an operation on his knee. He was able to resume employment on February 15, 1952.

Brown's regular occupation was that of a "cat skinner" and the going rate for a "cat skinner" in the State of Washington during the period of his disability was $17.20 per day.

During the year 1952, Brown had been employed by seven different employers, four being Washington employers and three Alaskan employers. He worked a total of 170 days in Alaska employment during which time he earned a total of $7,359.24. During the 158 days he was in the State of Washington prior to November 24, 1952, his total earnings were $2,646.57, an average of $16.74 per day.

Brown's annual earnings for 1951 totalled $6,126.48, but no showing was made of the amount of earnings during the period of the previous year analogous to the period of alleged disability, November 24 to February 15, although the sole reason that Brown brought his claim before the Alaska Industrial Board was in an effort to secure an increase in compensable average daily wage from the rate of $17.20 per day on which basis he was paid by the employer. He also received his medical expenses and payment of $708.75 for permanent partial disability representing 17½% loss of use of the leg, about which items there was no dispute.

Despite the absence of any showing that Brown was disabled between the date of termination of his employment on November 24 and the date of his operation on December 16, 1952, the Alaska Industrial Board awarded him compensation for the period from

November 24 to February 15, the day he was admittedly able to resume employment. The Board fixed his average daily wage earning capacity during his period of disability at $13.07 per day, apparently based on the proof of earnings for the period November 1, 1951 to May 15, 1952.

No objection was made to any failure of the Alaska Industrial Board to make findings of fact or any specific findings, nor was this raised as an objection to the award on appeal to the District Court. The learned judge for the United States District Court for the District of Alaska affirmed the decision of the Alaska Industrial Board, finding the facts as set forth in the transcript at pp. 10 to 12. From that decision, appellant has brought this appeal. In appellant's statement of points relied upon, no mention was made of any objection to alleged failure of the Industrial Board to make findings of fact or particular findings.

ARGUMENT.

I.

APPELLANT IS PRECLUDED FROM ATTACKING THE DECISIONS BELOW IN REGARD TO ANY ALLEGED DEFICIENCY OF THE FINDINGS OF FACT SINCE APPELLANT MADE NO OBJECTION IN THAT REGARD BEFORE THE ALASKA INDUSTRIAL BOARD OR THE UNITED STATES DISTRICT COURT, OR IN HIS STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

Appellant contends that there was a failure to make findings of fact as required by Sec. 43-3-16, ACLA

1949. This section specifies: "If an application for review is made to the Industrial Board . . . the full board . . . shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith." In the subject case, a hearing was held before the full membership of the Alaska Industrial Board. At that hearing, Mr. Brown submitted income tax returns revealing earnings during the year 1951 in the amount of $6,126.48. He also submitted an income tax return for the year 1952 showing total earnings of $10,005.81. The earnings for 1951 were not broken down, although they indicated that most of the work was performed in the State of Washington and that, in addition, Mr. Brown worked as a fisherman in Alaska during the fishing season. In 1952 his employment from January to May 15 was in the State of Washington. No showing was made as to his actual employment during the months of November and December 1951, or as to any earnings which Brown may have had during that period of time. This information was peculiarly within the knowledge of applicant.

The Alaska Industrial Board most generously allowed Brown compensation for the period from November 24, 1952, the day he departed from Alaska to Seattle, to February 16, 1953 when next he was employed, although he did not secure an operation on his leg until December 16, 1952. The Alaska Industrial Board in its Decision and Award referred to the internal revenue filings of Mr. Brown and con-

cluded "that his earning capacity is hereby determined to be $13.07 per day." No objection was made by counsel for appellant in regard to any failure of the Board to set out in detail the internal revenue filings upon which the Board obviously based its award, nor was any objection made to the absence of any specific findings.

The appellant then filed his appeal with the United States District Court, which complaint and appeal merely alleged, insofar as is material here: "The said award was in error as a matter of law in that the average daily wage earning capacity of the plaintiff was $10,005.81 annually instead of $13.07 per day." No mention was made of any failure to file findings of fact or specific findings of fact, and no argument to that effect was made before the United States District Court.

In designating the points relied upon for appeal to this honorable court, learned counsel for appellant made no mention of any deficiency in Alaska Industrial Board decisions or the District Court decree in regard to failure of the Board to make specific findings of fact. Due to appellant's failure to set forth this objection in the statement of points relied upon, it was not deemed necessary to include appellant's complaint and appeal to the United States District Court which made no mention of any alleged deficiency in regard to the findings of the Alaska Industrial Board.

In the case of *Western Nat. Ins. Co. v. LeClare,* 163 F.2d 337, this honorable court stated:

> "Three points argued by appellant were that the evidence is neither clear nor convincing; that it does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us."

The general rule as pertains to objections to findings of fact is set forth in 4 C.J.S., Sec. 310, as follows:

> "As a rule, only objections to the findings of fact or conclusions of law, or to the want thereof, which have properly been brought to the attention of the trial court will be considered on appeal, unless no opportunity was given to present the question. Accordingly, it cannot be objected for the first time on appeal that the findings are inindefinite or incomplete, informal, or not sufficiently specific . . ."

In the case of *Northwestern Steamship Co. v. Cochran,* 191 F. 146, it was stated:

> "The defense that the plaintiff was not the real party in interest was not made in the pleadings, nor was it suggested in the court below. The objection 'that plaintiff is not the real party in interest, and hence has no right to sue, comes too late when made for the first time in the appellate court.' "

This case involved an appeal from the United States District Court for the District of Alaska, Second Judicial Division.

This same, well established rule was enunciated by this learned court in the case of *DeJohn et al v. Alaska Matanuska Coal Co. et al, Agostino v. Same,* 41 F.2d 612, wherein the court stated:

> "There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver's hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us."

The *DeJohn* case is another case which was taken on appeal from a decision of the United States District Court for the District of Alaska.

These cases would certainly appear to be controlling as pertains to the objection now raised by appellant to the findings of fact since no objection was made in that regard either before the Alaska Industrial Board or the United States District Court. Certainly the United States District Court should have been given the opportunity to rule on this question had appellant desired to raise this issue and, furthermore, objections should have been taken before the Alaska Industrial Board as well.

The general requirements as to the necessary procedural steps to be taken before a question may be raised on appeal apply to workmen's compensation questions as well as to other matters. Thus it is stated in 146 A.L.R. 125:

> "Of course, a party who wants to attack a compensation award for lack of requisite express findings may be required to take appropriate procedural steps, such as seasonably to request the

> administrative tribunal to make certain findings of fact. And he may waive the deficiency in the award." See *Ruud v. Minneapolis Street R. Co.,* 202 Minn. 480, 279 N.W. 224; *State ex rel Probst v. Haid,* 333 Mo. 390, 62 S.W.2d 869; *Chicago & E. R. Co. v. Kaufman,* 78 Ind. App. 474, 133 N.E. 399.

In a similar situation involving alleged deficiencies in the findings of an administrative tribunal, the Eighth Circuit Court of Appeals stated:

> "We decline to consider this assignment of error for the reason that it appears from the transcript of record that no such question as that presented by the assignment ever was submitted either to the referee in bankruptcy or to the District Court. The only question passed on by the referee and the District Court and the only question submitted to them was whether the conditional sales contract involved in the case was lawfully acknowledged. There is no support anywhere in the transcript of record for the allegations of fact set out in this assignment of error, that the petition in involuntary bankruptcy and the schedules were filed on the same day and that the schedules did include acknowledgment of the existence of the conditional sales contract, and that it was a valid lien on the farm tractor." See *In re Elliott,* 72 F.2d 300 at 303.

Not only is the appellant precluded from objecting to the findings made by the Alaska Industrial Board, but it is apparent that adequate findings were made. The findings of the Board referred to the internal revenue filings which contained the specific facts.

The cases cited by appellant for the most part do not appear to be relevant. Thus the case of *Howard v. Monahan,* 33 F.2d 220, involved a case where no findings whatsoever had been entered by a Deputy Commissioner, although specifically instructed to make findings by the Compensation Commission.

In *Fireman's Fund Ins. Co. v. Peterson,* 120 F.2d 547, 548, cited by appellant at page 8 of his brief, the only question was whether the decision of the Commissioners was in accordance with the law and findings were not involved.

In the case of *DeVore v. Maidt Plastering Co.,* 205 Okla. 610, 239 P.2d 520, the findings failed to indicate on what theory the Commissioner had proceeded since they did not indicate whether the claimant "did not sustain an injury resulting in a strain to his back or whether it intended to find that he did receive such an injury, but that such injury did not constitute an accidental injury within the meaning of the workmen's compensation act, or whether he did receive such an injury and that it did constitute an accidental injury but that it did not arise out of and in the course of employment." Accordingly, the order of the Board was vacated for further proceedings and more detailed findings. In the subject case there is no question as to what the Board's ultimate findings were. The Board found that appellant's daily wage earning capacity was $13.07. The evidentiary facts on which this finding was based were set forth in detail in the decision of the chairman of the Board and the documentary evidence was submitted in toto to

the United States District Court. It thus became a simple question for the District Court on appeal to determine either that the award was based upon substantial evidence that appellant's daily wage earning capacity during the period of his disability did not exceed $13.07 per day, or that it did not exceed the $17.20 rate at which he was paid; and there was no ambiguous finding to be resolved by the District Court as in the *DeVore* case.

The decision in the case of *Wimmer v. Hoage,* 90 F.2d 373 (U.S.C.A., D.C.), would appear to state the applicable law when the court said:

> "It would have been more satisfactory if the Deputy Commissioner—as we have had occasion to admonish him before—had made specific findings based on the testimony introduced, for precisely that is what the act and regulations contemplate, and, as we think, require him to do. Because ordinarily such findings are necessary to enable us to say whether his award is in accordance with law. But enough appears here to convince us the claim is without merit, and so we think the holding of the Deputy Commissioner that the claimant is not entitled to compensation is clearly right and should be affirmed."

This result would be particularly applicable in the subject situation in view of the provision of the Alaska Workmen's Compensation Act to the effect that "An award by the full board shall be conclusive and binding as to all questions of fact . . ."

Sec. 43-3-22, ACLA 1949.

Many cases hold that a general finding of a compensation tribunal for or against a claimant is, in effect, a finding of each and every fact necessary to support such general finding. *Armstrong v. Industrial Accident Comm.,* 219 Cal. 673, 28 P.2d 672; *Garbowicz v. Industrial Commission,* 373 Ill. 268, 26 N.E. 2d 123; *Newman v. Rice-Stix Dry Goods Co.,* 335 Mo. 572, 73 S.W.2d 264; *Amerada Petroleum Corp. v. White,* 179 Okla. 82, 64 P.2d 660. In any event, it appears clear that appellant is precluded from raising this objection for the first time on appeal to this honorable court when no objection was made either before the Alaska Industrial Board or the United States District Court in regard to any alleged deficiency in the findings of the Board nor were any findings requested by appellant. Also, the findings as made appear adequate and are amply supported by the evidence.

II.

THE EVIDENCE SUPPORTS THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

The Alaska Industrial Board found that appellant's average daily wage earning capacity during the period of disability was $13.07. While appellant's alleged injury occurred on September 15, 1952, he was able to continue in his highly paid Alaskan employment until that employment terminated on November 24. It is to be noted that the District Court for the

District of Alaska found that his employment terminated on that date. See Finding 2 of the District Court's Findings of Fact and Conclusions of Law, Tr. 10. There is no evidence upon which to base the inference suggested by learned counsel for the appellant to the effect that the employment would have continued had it not been for the injury. The burden of proof in that regard was on the appellant and, in the courts below, this theory was not even suggested as all parties agreed that the job had terminated on November 24. The learned counsel now representing appellant did not participate in the proceedings in the lower courts.

There was no showing made by the applicant as to his earnings during the months of November and December 1951. There was such a breakdown for the year 1952, indicating that from January 1, 1952 to May 15, 1952, while employed in the State of Washington, applicant earned a total of $2,521.78, being the sum of $1,215.70 earned from Builders Equipment Rental, Edmonds, Washington, and the sum of $1,306.08 earned from Campbell-Atherton Co., Arlington, Wash. Taking the total number of days involved from November 1, 1951 to May 15, 1952, being 195 days, and dividing the earnings proved by the applicant, being $2,521.78, by the figure of 195 days, we arrive at an average daily wage earning capacity of $12.93 per day. Apparently the Board erroneously used the figure of 193 days being involved in the period and thus came up with the larger average daily wage of $13.07. This error of course

favored the employee and, since the employer is not objecting thereto, it is submitted that, based on the evidence presented to the Board, it reached a reasonable result.

It was admitted that appellant's usual work was that of a "cat skinner" and it further was established that the going rate for that type of employment in Seattle, Washington, where appellant usually resided and where he resided during the period of time during which he was disabled, was $17.20 per day. Assuming that he would have had employment during this period of time, which would certainly be a most favorable assumption in the absence of any evidence to that effect from the appellant and in the face of known fact that jobs as cat skinners are not easy to obtain during the winter months, it is reasonable to assume that he would not have earned more than $17.20 per day, on which basis he was paid compensation by his employer.

Moreover, an examination of the earning record of the appellant during the year 1952 indicates that his earnings in Alaska totalled $7,359.24 for a 170 days working period. During the 158 days that he was in the State of Washington prior to November 24, 1952 but during the year 1952, his total earnings were $2,646.57, an average of $16.74 per day. It certainly would be unreasonable to assume that during the alleged period of from November 24 to February 15 he would have earned average wages in excess of those earned at his known Washington employment during the balance of the year.

The applicable Alaska statute is Sec. 43-3-1, ACLA 1949, which provides, insofar as pertinent:

> "For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages . . .
>
> "The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

A check of workmen's compensation statutes in the forty-eight states and the Territory of Hawaii fails to reveal any provision very closely akin to the Alaska statute quoted above. The wording appears to be closest to that found in the United States Longshoremen's and Harbor Workers' Act, Title 33, U.S.C.A., Sec. 908(h). The Longshore Act, however, deals with fixing a sum representing wage earning capacity to be used for weekly payments in cases of permanent partial disability and temporary partial disability. It does not apply, as does the Alaska Act, to situations involving temporary total disability and, accordingly,

the decisions under this provision of the Longshore Act are not helpful in construing the Alaska Act. Even less relevant is a decision such as the case of *O'Hearne v. Maryland Casualty Co.,* 177 F.2d 979, cited by appellant since it deals with an entirely different statutory basis for ascertaining average daily wages. The whole question in that case was whether compensation should be awarded on the basis of 33 U.S.C.A., Sec. 910(b) or Sec. 910(c), and this in turn depended upon whether there was evidence to the effect that claimant's employment was intermittent and discontinuous. The court quoted from its previous decision in *Baltimore & O. R. Co. v. Clark,* 4 Cir., 59 F.2d 595 at 599, as follows:

> "Subdivisions (a) and (b) are applicable only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by three hundred would approximate the average annual earnings. Where the employment is intermittent or discontinuous in its nature, multiplying the average daily wage paid during employment by three hundred would give as annual earnings a sum far in excess of the actual earning power of the employee, and consequently that method of determining average annual earnings cannot reasonably be applied and the method prescribed by section (c) must be followed . . ."

indicating its disapproval of payments based on average of annual earnings where employment is intermittent or discontinuous such as in the subject case.

The United States District Courts in Alaska in two Divisions have given constructions to the provision dealing with temporary disability compensation. The late Judge Anthony Dimond, in a detailed and very well reasoned decision, sets forth the applicable considerations in *Vanney v. Alaska Packers Ass'n,* 12 Alaska Rep. 284. Judge Dimond discussed the seasonality of various employments in Alaska, stating:

> "The packing of salmon is a seasonal operation. In the Bristol Bay area, the actual taking of salmon is limited to a period of 30 days. But considerable work must be done in preparation for packing and, at the close of the season, in shipment of the pack. When salmon are plentiful all in the industry work at top speed and for long hours. Compensation is made not only by minimum base rate pay but by overtime and a share or percentage of the pack."

In discussing the Alaska statutory provision dealing with determination of average daily wage earning capacity, Judge Dimond states:

> "It seems evident that the provisions of the law quoted above give to the Board a wide discretion, to be soundly and justly exercised, in fixing the average daily wage earning capacity of the injured employee, and that the discretion is not limited to the wages currently being earned daily by the employee at the time he sustained the injuries. For example, it seems plain that if the petitioner in this case had been unable, by reason of his injury, to perform any work after July 9, the date he sustained the injury, his disability compensation would rightly be calculated upon his full earning capacity for the season in his cur-

rent employment, provided he was disabled for the entire remainder of the season.

"The origin of the above-quoted provisions of our statute (Sec. 43-3-1 ACLA 1949) is not known. The legislative history of the Act discloses no information on the subject.

"Under the law as written it appears to be the duty of the Board, in every such case, to determine the amount of wages or compensation the injured employee is capable of earning *and* of which he is or may be precluded from earning and receiving by reason of his injuries, and base the award on that result. Doubtless, evidence of the current and past wage earnings, including bonuses, percentages of product, and payments for overtime, as well as the commonly established or accepted standards of wages in the industry or occupation in which the injured employee has been engaged or which he may follow for a livelihood, are all factors that may be properly considered by the Board in making an award. But the *ultimate test is, what has the employer lost in wages or compensation by reason of his injuries? That seems to be the standard which the law prescribes, and the standard with which the Board endeavored to comply.*" (Last italics ours.)

The test, as set forth above in Judge Dimond's decision, appears to be eminently fair and doubtlessly is what the Alaska legislature had in mind when it enacted the provision quoted above in Sec. 43-3-1 ACLA 1949. The purpose of workmen's compensation legislation is to partially compensate employees for disability resulting from injuries arising out of and

in the course of their employment, with a view toward having the burden of the employee's loss of earnings absorbed by the general public in the price of the product rather than being borne by the employee alone. It was never intended, and, as far as can be ascertained by diligent research, has never been suggested by the most ardent proponents of liberal compensation legislation, that the employee was to make a profit as a result of his injury. If the position of the appellant were to be upheld, it would lead to this patently absurd result. Thus, as in the subject case, an employee could earn over $1,400 a month while working seasonally in Alaska. During the off-season when the employee resided in one of the states where the cost of living is greatly less than in Alaska, he would be entitled to receive 65% of his average daily wage. In a hypothetical case, it might well be established that the maximum wages which the employee would have been able to have earned in that state had he not been injured amounted to $200 per month. 65% of his loss of wages due to his injury would thus amount to $130 a month. If appellant's theory were taken, the employee would receive, during this period of time when the most that he would have earned would have been $200.00, the sum of $910 per month based on 65% of his seasonal earnings, or, if the average of seasonal and non-seasonal earnings were taken, the sum of $520 a month ($1,400 plus $200 divided by 2=$800 x 65%=$520.00 compensable wage). It further must be recognized that the sums received as workmen's compensation are not taxable under the

federal income tax laws so that they represent substantially larger gross earnings than the amount specified. Certainly it would be an odd result to have a man, while incapacitated, receive substantially more than the earnings he would normally have made while well, under a compensation system whereby his compensation is awarded without regard to any fault of the employer.

The Alaskan situation is probably unique in lending itself to the possibility of such an anomalous situation. It is well recognized that the cost of living in Alaska varies from 33⅓% to more than 50% higher than the equivalent costs in the states. Thus the last report prepared by the Territorial Department of Labor on relative food prices, using the average of stateside prices as 100, indicated that the comparative prices in Alaska varied from 133.12 in Ketchikan to 155.76 in Fairbanks and 156.41 in Kodiak. See Biennial Report, Territorial Department of Labor, 1949-50, page 7. Other cost of living figures indicate substantially higher costs in Alaska in relation to "stateside" costs than the relative food prices quoted above. See Ernest Gruening, *The State of Alaska,* page 426, Random House 1954, indicating costs of living in Alaska were 35.52% to 116.16% higher than average Washington, D. C. costs of living. Wages are extremely high during the seasonal period of employment and vast numbers of workers come to the Territory during the summer months with a view to making their entire annual earnings, or almost their entire annual earnings, during that period of time.

If the Alaska legislature had not made a provision such as that contained in Sec. 43-3-1 cited above, there would be a substantial incentive for employees to stay "disabled".

As Judge Dimond stated in his able opinion:

> "Just as no one should be denied a fair award because, by reason of his injury, he may be unable to prove that he would inevitably have had remunerative employment during the period of his actual disability, so also, one temporarily or seasonally employed at wages above the scale which he was earning or is capable of earning during the remainder of the year may not justly claim disability compensation based on those seasonal or temporary wages for a disability arising during such employment which does not really disable the employee until after the temporary or seasonal employment has been carried through to completion without any loss of wages therefor."

Counsel stated that "The injured workman's disability reaches into the future and not the past and that his loss as a result of such disability has an impact only on probable future earnings," citing Larson's Workmen's Compensation Law, Volume 2, page 71, Section 60.11. Larson in that section is discussing installment payments for permanent partial disability; nevertheless, it is conceded that the disability reaches into the future and the loss as a result of the disability affects the earnings during that future period. The question presented in regard to determining average daily wage earning capacity under the Alaska Act is the amount of wages which the

employee could reasonably have been anticipated to have earned during the period of disability had he not been injured. The only logical means of estimating such loss of earnings is based on the past record of employment of the employee in the absence of the employee showing unusual circumstances to indicate that he would have received wages on a different basis during the particular year that his disability resulted. The statement of Judge Dimond in the *Vanney* case in regard to the duty of the applicant to show any such unusual circumstances is equally pertinent to the subject situation. He said:

> "The petitioner himself offered no proof as to what he had earned in any preceding year between September 20 and December 31, or of his opportunity, actual or potential, for earnings between September 20 and December 31, 1946. Nor did he offer any proof as to his earnings, daily, weekly or monthly before June 1946. The only evidence on the subject was provided by the defendant's insurer to the effect that the petitioner paid income tax upon gross income of $2,519.92 received between January 1 and September 15, 1946. This was not disputed. We know from all of the evidence that of his total income during the period mentioned, he earned $1,463.70 between June 1 and September 15, 1946, and was paid that amount by the defendant Association, thus leaving a balance of $1,056.22 which he must have earned and received between January 1 and June 1, 1946, a period of five months, which, when broken down, would amount to $211.24 per month or almost exactly $7.00 per day. Between June 1, and September 15, 1946, under his sea-

sonal employment by the Association, his earnings averaged $418.20 per month or $13.67 per day.

"The only reasonable conclusion at which one may arrive, in the absence of any other evidence on the subject, is that plaintiff's daily wages between September 20 and December 31, 1946, would probably not have exceeded the average of his earnings between January 1 and June 15, 1946. Accordingly, I find that the average wage earning capacity of the petitioner between September 20 and December 31, 1946, was not in excess of the amount agreed to by the Association's insurer and approved by the Board of $233.00 per month, or $7.76 per day, and the award of the Board of Compensation for so much of that period as falls between October 9 and December 31, 1946, inclusive, is affirmed.

"If the petitioner is entitled to any additional compensation based upon his anticipated or possible earnings between September 20 and December 31, 1946, he has had ample opportunity to so show. He was at all times represented by counsel. No such showing has been made or even suggested."

The burden is always on the employee to prove his average daily wages in a compensation proceeding. See *City of Connersville v. Adams,* 121 Ind.App. 353, 98 N.E.2d 230, and *Bennett v. Walsh Stevedoring Co.,* 46 So.2d 834, 253 Ala. 685.

As mentioned above, the Alaska Workmen's Compensation Act specifies that the findings of the Board "shall be conclusive and binding as to all questions of fact." Sec. 43-3-22 ACLA 1949. The Board in the

subject case has found that Brown's average daily wage during the period of his disability was $13.07 per day. This was affirmed by the learned judge of the United States District Court for the District of Alaska. The law in regard to appeals from a Board's findings is set forth in Larson's Workmen's Compensation Law, Volume 2, Sec. 80.10, as follows:

> "A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course."

It would be superfluous to cite the many cases supporting this well established principle of law. Certainly there is substantial evidence upon which the Alaska Industrial Board and the United States District Court for the District of Alaska determined that Mr. Brown's average daily wage during the period of his disability was not in excess of $13.07 per day.

In any event, even assuming full employment by Brown during the period of his disability, his average wages would not have exceeded $17.20 and there was no reason for the Board to assume that Brown

would have been fully employed during this period of time in the absence of a showing to that effect by the appellant.

CONCLUSION.

Adequate findings were made by the Alaska Industrial Board in its Decision and Award and, in any event, appellant is precluded from objecting to any alleged absence of findings in view of the fact that no requests for findings were made before the Board and no objections raised before the Board or the United States District Court or in the statement of points relied upon on appeal.

The finding of the Alaska Industrial Board to the effect that Brown's average daily wage earning capacity during the period of his disability was $13.07 was amply supported by the evidence and, in the alternative, the evidence clearly indicated that his average daily wage earning capacity during the period of his disability did not exceed $17.20 per day, the rate at which he was paid by the employer. Accordingly, it is respectfully submitted that the decree of the United States District Court should be affirmed.

Dated, Juneau, Alaska,
March 23, 1955.

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